ORIGINAL

S E R V E D
April 12, 2012
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 09-01

MITSUI O.S.K. LINES LTD.

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC., AND CHAD J. ROSENBERG

APRIL 12, 2012, MEMORANDUM AND ORDER ON PENDING MOTIONS

On February 17, 2012, the parties appeared for a hearing in the Commission's Main Hearing Room for argument on the following motions and filings related to them addressed in this Order:

> Request for issuance of a Subpoenas *Duces Tecum* addressed to Nintendo of America Inc. submitted by Global Link Logistics, Inc. (Global Link) on October 17, 2011;
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> Joint Motion to Compel Compliance with Outstanding Discovery and for Sanctions filed on October 11, 2011, by respondents Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, David Cardenas, and Keith Heffernan;
>
> Complainant's Motion for Leave to Subpoena and Re-Depose Non-Party Witness Paul McClintock Pursuant to Commission Rules 131 and 201 filed by complainant Mitsui O.S.K. Lines Ltd. on November 23, 2011.

At the hearing, Mitsui was represented by attorneys Marc J. Fink, Anne E. Mickey, and David Y. Loh. Global Link was represented by attorneys David P. Street and Brendan Collins. Olympus Respondents were represented by attorneys Harvey Levin and Kathleen Kraft. CJR Respondents were represented by attorney Zheng Xie.

As explained below, the request for a subpoena to nonparty Nintendo is denied. Limited discovery into the Mitsui/Nintendo relationship will be permitted as potentially relevant to Mitsui's claim for a reparation award. The request to re-depose the nonparty witnesses is denied.

I. DISCOVERY INTO RELATIONSHIP OF MITSUI AND NINTENDO.

A. Background.

Two matters are currently pending that seek discovery into the relationship of complainant Mitsui (or MOL) and its customer Nintendo of America Inc. (Nintendo). On October 11, 2011, the Olympus Respondents filed a Joint Motion to Compel [Mitsui's] Compliance with Outstanding Discovery and for Sanctions. Olympus Respondents state that all Respondents join in the Joint Motion. The Joint Motion moves "for an order compelling Complainant Mitsui . . . to respond to outstanding discovery propounded by the Olympus Respondents and for sanctions for Mitsui's knowing and willful failure to produce complete and truthful responses." (Joint Motion at 1.) The discovery at issue is Respondent Olympus Growth Fund, III, L.P.'s First Sets of Requests for Admission, Interrogatories, and Requests for Production of Documents to Complainant dated December 24, 2010. (Joint Motion, Exhibit 1.)

The Shipping Act permits the Commission to subpoena evidence in an adjudicatory proceeding. 46 U.S.C. § 41303(a); 46 C.F.R. Part 502, Subpart I. On October 17, 2011, respondent Global Link delivered a Subpoena *Duces Tecum* to the Office of Administrative Law Judges with a request that the presiding officer sign it. *See* 46 C.F.R. § 502.131. If issued, the subpoena would require Nintendo, which is not a party to this proceeding, to produce its Mitsui service contracts and records of its shipments with Mitsui for the period 2003 to 2009. Mitsui opposes the motion to compel and opposes issuance of the subpoena.

The motion to compel and the subpoena raise the issue of whether the information they seek is within the scope of discovery. As described by the Commission, Mitsui's Amended Complaint alleges that:

> between 2004 and 2006, Global Link engaged in "split routing" on Mitsui shipments in violation of the Act. "Split routing" occurs when an NVOCC books cargo with a vessel-operating-common carrier (VOCC) for shipment to one inland destination in the United States, while intending to deliver the cargo to a different inland destination. Mitsui alleges that it suffered injury as a result of respondents' split routing practice and is entitled to reparations.

Mitsui v. Global Link, FMC No. 09-01, Order at 3 (FMC Aug. 1, 2011) (Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motions to Dismiss). As described in an earlier Order by the undersigned:

> Although Global Link knew the shipment was to be transported to Destination A, Global Link would tell Mitsui that the shipment was to be transported to Destination B . . . . Mitsui would issue a through bill of lading identifying Destination B as the place of delivery and Mitsui would be paid at the Destination B rate set forth in the service contract. When the cargo arrived in the United States,

> however, Global Link would issue a separate bill of lading to the carrier for the inland leg of the transportation identifying Destination A as the place of delivery and tell the inland carrier to ignore Destination B set forth in the Mitsui through bill of lading. Global Link did not notify Mitsui that the shipment was going to Destination A, request in writing diversion of the shipment from Destination B as required by the service contract, or pay Mitsui the diversion charge and the difference in price between Destination B on the Mitsui [service contract] and Destination A, the place where delivery had been intended all along.

Mitsui v. Global Link, FMC No. 09-01, Order at 4 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss).

In their answers, Respondents allege that Mitsui knew of and acquiesced in Global Link's alleged "split routing." Global Link contends that Mitsui knew of, participated in, and failed to object to Global Link's alleged "split-routing," "mis-booking," and "re-routing" practices. (Global Link Answer at 10-12.) Olympus Respondents contend that:

> Respondent Global Link engaged in the practice of split-routing with the full consent, and whole-hearted encouragement of senior Mitsui sales personnel, including Paul McClintock and Rebecca Yang. Mitsui's knowing participation in the practice of which [*sic*] they now assert to be unlawful – split-routing – precludes it from recovering any reparations whatsoever based on that practice.

(Verified Answer of Olympus Respondents at 4.) CJR Respondents contend that Mitsui had knowledge of, participated in, and encouraged the practice of split routing. (Verified Answer of CJR Respondents at 8, 15, 16.)

The Joint Motion states that during the depositions of two former Mitsui employees – Paul McClintock on September 21, 2011 and Rebecca Yang on October 4, 2011 – Respondents learned that "Mitsui had a 'standard operating procedure' with Nintendo . . . whereby Mitsui, over several years, moved containers to locations outside of the applicable service contract point." (Joint Motion at 3.) The Joint Motion claims that this testimony demonstrates that at the same time Global Link was engaged in the practice of "split routing," Mitsui had a "standard operating procedure" with Nintendo pursuant to which Nintendo would direct all of its shipment to one or two door points, then notify Mitsui that the shipment should go elsewhere. Respondents further claim that Mitsui would transport the shipment to the new destination, but did not charge Nintendo the service contract rate for the new destination or a diversion fee

The Joint Motion claims that the existence of this "standard operating procedure" supports a finding that:

> Mitsui's responses to the Olympus Respondents' Interrogatory Nos. 4, 17-22, 28-29, 31, 34-37 and 41, and Request for Production Nos. 1, 7, 10 and 11 are deficient, incomplete and arguably inaccurate and misleading. On September 21 and October

4, 2011, former Mitsui employees testified that Mitsui had a "standard operating procedure" with Nintendo, a shipper, whereby Mitsui would move containers to locations outside of the applicable service contract point. This procedure continued for several years and coincided with Mitsui's split-routing with Global Link. Yet, Mitsui's responses to the Olympus Respondents' discovery suggest that no such procedures existed, for any shippers.

For example, Mitsui responded to Interrogatory No. 17 by stating that "[w]hen [diversion] requests are received that are addressed in a manner consistent with the MOL tariff and any applicable service contract terms, which generally means rerating the cargo and assessing a diversion fee." That statement is manifestly false. It clearly was not the case with Nintendo. Mitsui did not explain, and in fact concealed in its discovery responses, that it had a standard operating procedure to divert cargo without rerating the cargo or assessing a diversion fee for one of its largest shippers.

This procedure with Nintendo was another form of split-routing. However, Mitsui did not include any information concerning Nintendo in its responses to discovery on split-routing. Mitsui was required to describe all discussions it had with any shipper concerning, relating or referring to the issue of split-routing in response to Interrogatory No. 37. Mitsui's response: None. While conceding that it "occasionally received complaints about unauthorized diversions," it withheld disclosing its procedure with and investigation of Nintendo. But whether Mitsui classifies its conduct with Nintendo as diversion or split-routing, the disclosure was sought by the Olympus Respondents in their discovery requests. The Olympus Respondents specifically requested information concerning diversions, as well as split-routing, so that Mitsui could not avoid responding to discovery by its convenient terminology.

Mitsui also failed to produce relevant documents relating to Nintendo. For example, Request 11 seeks all documents concerning, relating or referring to Mitsui's collection or waiver of a diversion fee from a shipper over the past ten years. This clearly calls for the production of documents relating to Nintendo, where containers would be directed to location outside of the service contract and/or bill of lading, and where Mitsui did not charge Nintendo diversion fees or rerate the shipments. This request also encompasses any documents relating to Mitsui's investigation into Nintendo and its efforts to modify the applicable contract to add the true destination points.

Mitsui's standard operating procedure with Nintendo is clearly relevant to the claims and defenses in this proceeding. Mitsui argues that, other than a few "isolated incidents," it had no knowledge about Global Link's split-routing practice. Yet, in the case of Nintendo, Mitsui knew about and continued the procedure for several

> years. Mr. McClintock confirmed that Mitsui personnel knew about and directly participated in the practice because they did not believe it was a "problem":

(Joint Motion at 13-15 (citations to exhibits omitted) (footnote omitted)). Respondents' contention is based on the deposition testimony of former Mitsui employees McClintock and Yang, neither of whom worked on Nintendo shipments during the period in which it is alleged that Global Link engaged in "split routing." Deposition of Paul McClintock at 207 (McClintock became aware of the Nintendo situation in 2008); Deposition of Rebecca Yang at 19 (McClintock told Yang of Nintendo situation after he learned of it).

Commission Rule 131 requires subpoenas to be signed by the presiding officer and permits the presiding officer to "require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought." 46 C.F.R. § 502.131. When Global Link submitted the Nintendo subpoena for signature, I required Global Link to make this showing. *Mitsui v. Global Link*, FMC No. 09-01 (ALJ Oct. 20, 2011) (Order Requiring Global Link to Show Relevance and Reasonable Scope of Subpoena). Global Link responded that the evidence sought from Nintendo "goes to the heart of the case, *i.e.*, did MOL condone and encourage split routing? The Respondents are entitled to discovery related to this crucial issue," (Global Link Response to October 20, 2011, Order Requiring Showing of Relevance and Reasonable Scope (filed October 27, 2011) at 3), and "easily satisfies" the Commission's liberal scope of discovery. "The evidence . . . reflects that MOL, far from being deceived and defrauded by Global Link's split routing, knew of and actively encouraged the split routing practice." (*Id.* at 8.)

Global Link contends that the existence of this Mitsui/Nintendo "standard operating procedure" is relevant or reasonably calculated to lead to the discovery of admissible evidence relevant to Respondents' claims that Mitsui knew that Global Link was engaged in the practice of "split routing."

> MR. COLLINS: Your Honor, we would simply submit showing that they were willing to violate the Shipping Act in regards to Nintendo, which we submit this clearly was a violation of the Shipping Act, makes it we think as a matter of discovery, at least at the discovery stage that we're entitled to show that – it tends to prove that they would certainly be willing to do it with Global Link, as well.
>
> JUDGE GUTHRIDGE: But that's not what their allegation or their complaint is, and that's what I asked you to – assuming it's correct that Mitsui was violating the Shipping Act with Nintendo by the way they developed this operation going to one place or two places, and then the container ended up any of a number of places. Does that make it more or less probable that Global Link provided the false information?
>
> MR. COLLINS: It doesn't impact that at all, Your Honor. It goes to the knowledge issue, which we think is the primary issue before the Court. And that's – we're entitled to discovery to know whether they, in fact, willfully engaged in split routing.

JUDGE GUTHRIDGE: How does the fact that Mitsui may have known that Nintendo cargo was ending up at different places? How does it make it more or less probable that Mitsui knew that Global Link was doing that?

MR. COLLINS: Your Honor, to the extent that they were fully aware that one of their largest customers was engaging in split routing, and they were condoning it, encouraging it, and actually handling it, we think it's very probative to say that they certainly – would give them an inkling that the same thing is happening with their other shippers.

JUDGE GUTHRIDGE: Why?

MR. COLLINS: That they'd certainly be under a duty to investigate to determine are these shipments going to the location specified?

JUDGE GUTHRIDGE: Well, apparently, from what you're saying, Mitsui must have known somehow that the Nintendo cargo was going someplace other than the place in the Bill of Lading.

MR. COLLINS: They were delivering it themselves, Your Honor.

JUDGE GUTHRIDGE: And, presumably, Nintendo was telling them where they wanted to go – wanted the cargo to go. Is that correct?

MR. COLLINS: Well, Your Honor, we're at a disadvantage. They didn't produce any Nintendo documents, so we –

JUDGE GUTHRIDGE: Who else would have told them, I guess is the thing.

MR. COLLINS: Your Honor, I'm not disputing that. But I'm saying we don't have the documents, so I don't want to get – it would be helpful if we actually had the discovery.

February 17, 2012, Transcript of Oral Argument at 52-54.

B. Relevance of Mitsui/Nintendo Relationship.

For the purposes of this memorandum and order, I assume this to be true: Mitsui and Nintendo had a "standard operating procedure" pursuant to which one destination was listed as the place of delivery on the bills of lading for Nintendo shipments, then, pursuant to instructions given to Mitsui by Nintendo, Mitsui would arrange for the shipment to be delivered to another destination. I also assume that Mitsui did not charge Nintendo a diversion fee or rerate the freight charges.

Commission Rule 201 establishes the scope of discovery in Commission proceedings.

> Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party . . . . It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

46 C.F.R. § 502.201(h). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

1. The Mitsui/Nintendo relationship (or similar relationships between Mitsui and other shippers) is not within the scope of discovery on the issue of whether Global Link engaged in "split routing."

I first note that Respondents concede that Global Link engaged in the practice of "split routing." In its Verified Answer, "Global Link admits that historically Global Link engaged in a practice variously described as 'split routing,' 'mis-booking,' and 're-routing' by booking cargo to false inland destinations while intending to deliver the cargo to different inland destinations." (Global Link Answer ¶ IV.E.) Olympus Respondents state that they:

> became aware during the arbitration proceeding . . . that Global Link engaged in a practice called "split routing' . . . in which:
>
> i. Global Link would enter into an international shipping contract with Mitsui for the transportation of cargo from an origin point in Asia to a final destination in the United States;
>
> ii. Mitsui would transport the cargo across the ocean and arranged for the inland delivery of the container by rail and/or truck; and
>
> iii. Global Link would make a separate arrangement with the motor carrier to deliver the cargo to a final destination point that was different from the destination point specified in the bill of lading issued by Mitsui.

(Verified Answer of Olympus Respondents at 7.) CJR Respondents "admit that Global Link sometimes engaged in a business practice called 're-routing' which is common in the industry and which is also sometimes referred to as 'split shipping'." (Verified Answer of CJR Respondents at 8.)

In the February 17, 2011, hearing, counsel for Global Link conceded that even if Mitsui and Nintendo followed this "standard operating procedure," this evidence would not be relevant to Mitsui's claim that Global Link provided false information to Mitsui.

> JUDGE GUTHRIDGE: . . . [A]ssuming it's correct that Mitsui was violating the Shipping Act with Nintendo by the way they developed this operation going to one place or two places, and then the container ended up any of a number of places. Does that make it more or less probable that Global Link provided the false information?
>
> MR. COLLINS: It doesn't impact that at all, Your Honor.

February 17, 2012, Transcript of Oral Hearing at 51-52.

Therefore, even if the question of whether Global Link engaged in the practice of "split routing" were at issue, the existence or non-existence of the assumed Mitsui/Nintendo "standard operating procedure" does not have a tendency to make it more probable or less probable that Global Link engaged in this practice as alleged in Mitsui's Amended Complaint; that is, Global Link told Mitsui that a shipment was going to Destination B, which would then be stated in Mitsui's bill of lading, when Global Link knew that it was going to Destination A, then, without Mitsui's knowledge, Global Link would issue a bill of lading directing the inland carrier to deliver the shipment to Destination A. Whatever the Mitsui/Nintendo "standard operating procedure" may have been, it proves nothing about the Global Link practice of "split routing." The same is true of any similar relationships between Mitsui and other shippers.

2. The Mitsui/Nintendo relationship (or similar relationships between Mitsui and other shippers) is not within the scope of discovery on the issue of whether Mitsui knew that Global Link engaged in "split routing."

The existence or non-existence of the assumed Mitsui/Nintendo "standard operating procedure" does not have a tendency to make more probable or less probable Respondents' allegations that Mitsui knew that Global Link engaged in the practice of "split routing." Furthermore, whether or not the assumed Mitsui/Nintendo "standard operating procedure" violates the Shipping Act, the fact that at the request of Nintendo, Mitsui would deliver a shipment to a destination other than the destination on the Mitsui bill of lading does not tend to prove or disprove that Mitsui knew that after Mitsui issued a bill of lading for a Global Link shipment to one inland destination, "Global Link would issue a second bill of lading showing the true inland destination. Global Link would provide this bill of lading to the trucking company and tell the trucking company to disregard the instructions received from MOL." (Amended Complaint ¶ IV.H.) The same is true of any similar relationships between Mitsui and other shippers. The fact that Nintendo shipments may have been transported to destinations other than on the Mitsui bill of lading with Mitsui's knowledge does not impose on Mitsui a duty to investigate whether other shippers engaged in "split routing" practices similar to that of Global Link without Mitsui's knowledge.

3. The Mitsui/Nintendo relationship may be relevant to the issue of a reparation award.

Counsel for Olympus Respondents argues that the Mitsui/Nintendo "standard operating procedure" is relevant to the question of Mitsui's claim for a reparation award for lost diversion fees.

> MR. LEVIN [Olympus Respondents' counsel]: . . . I understand from what Mr. Collins has said, and I've heard no disagreement on the other side, that these – that the practice between Mitsui and Nintendo was without any diversion fee, and without any re-rating.
>
> Now, in the complaint, the amended complaint, Mitsui is alleging that they were fraudulently deprived of diversion fees and re-rating, that this was a fraudulent scheme. And we have to look at the result that they were deprived or denied of this money. But if, in fact, their practice with their large clients, or their large customers was it was freely allowed, and there were no diversion fees, and there were no re-ratings, and no money that accompanied that, then I think that that's very relevant to show there was no expectation here, especially in combination with the fact that there are emails showing knowledge that it was going on with Global Link, that there's no expectation in their minds – when they're dealing in this business with their big customers, there is no expectation of diversion fees, and there is no expectation of re-rating whenever there is, if you want to call it a diversion of cargo.

February 17, 2012, Transcript of Oral Argument at 56-57.

Information about Mitsui's actual practices with regard to enforcement of the Nintendo service contract requirements on diversion may be relevant to Mitsui's claim for a reparation award. Given the fact that as many as 70,000 shipments are at issue in this proceeding, Global Link is a large customer of Mitsui. If Mitsui had a practice of not charging its large customers the diversion charges or not rerating the shipment when the destination is changed during the shipment, the existence of this practice may affect any claim for damages in this proceeding.

C. Respondents' Discovery.

1. Subpoena of Nintendo shipping records.

Nintendo is not a party to this proceeding. "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1), *cited in Exclusive Tug Franchises - Marine Terminal Operators Serving the Lower Mississippi River*, FMC No. 01-06 (ALJ Jan. 4, 2002) (Motion to Reconsider Rulings Concerning Two Depositions of Messrs. Holt and Beech Denied) ("it is proper to consider the burden on [nonparties]"). *See also* Fed. R. Civ. P. 45(c)(3)(A) ("On timely motion, the issuing court must quash or modify a subpoena that: . . . (iv) subjects a person to undue burden.").

> Although discovery is by definition invasive, parties to a law suit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.

Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998), *citing Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993); *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980); *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 468 (D. Mass. 1993). *See also Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 41-42 (1st Cir. 2003).

As Global Link recognizes, the Nintendo shipping documents should be equally accessible from Mitsui. February 17, 2012, Transcript of Oral Argument at 43. Counsel for Olympus Respondents argues:

> MR. LEVIN: . . . Mr. Fink has made the case for the necessity for subpoenaing Nintendo, because if he is saying that they don't have knowledge of Nintendo, and Nintendo was doing this, and Nintendo was doing that, that will not be in the Mitsui documents. And the only way that this side of the room is going to find out if what Mr. Fink represents is correct, the only way we're going to find out what Mitsui knew and what was going on is through a subpoena of Nintendo. But there's no – but Mitsui supplying documents from its side is clearly no substitute. It's no equivalent.

February 17, 2012, Transcript of Oral Argument at 62. Even if the Mitsui/Nintendo shipping records were relevant or their production appeared reasonably calculated to lead to the discovery of admissible evidence on the issues of whether Global Link engaged in the practice of "split routing," that Mitsui knew Global Link engaged in this practice, or whether Mitsui charged its large customers the diversion charges or rerated shipments when the destination is changed during the shipment, the current record does not support imposing the burden of responding to Global Link's requested subpoena on nonparty Nintendo. To the extent there may be some additional information in Nintendo's records that could not be found in Mitsui's records, such as on Mitsui's claim for a reparation award, the burden of producing that information on Nintendo outweighs any potential benefit in obtaining the information.

Global Link has not made a showing of the general relevance and reasonable scope of the Nintendo shipping records sufficient to require nonparty Nintendo to incur the burden of responding to the subpoena. 46 C.F.R. § 502.131. Therefore, I am denying Global Link's request to sign and issue the subpoena.

2. Respondents' Joint Motion to Compel.

The Joint Motion to Compel seeks an order compelling Mitsui to produce not only Nintendo information, but to respond to fifteen interrogatories and to search its records over a ten-year period for instances of diversions on shipments carried for any of its shippers. For this motion, I assume that there may be another shipper (NVOCC or proprietary) that was engaged in a practice of "split routing" identical to that alleged of Global Link. I also assume that there may be another shipper with which Mitsui had a "standard operating procedure" that is similar to the assumed Mitsui/Nintendo "standard operating procedure." For the reasons stated above, the existence of that shipper's practice would not have a tendency to make it more probable or less probable that Global Link engaged in a practice of "split routing." For the reasons stated above, whether Mitsui knew or did not know of that other shipper's "split routing" practice would not have a tendency to make it more probable or less probable that Mitsui knew of Global Link's "split routing" practice. Therefore, the information sought by the Joint Motion to Compel is not relevant or likely to lead to the discovery of relevant evidence on either of these issues.

The Joint Motion argues that Mitsui's original responses to the discovery "are deficient, incomplete and arguably inaccurate and misleading" and that at least one statement "is manifestly false." (Joint Motion at 13, 14.) Based on my examination of the record and Mitsui's discovery responses, I do not agree.

As noted above, the claim that Mitsui and Nintendo had a "standard operating procedure" for rerouting shipments to a destination other than that on the Mitsui bill of lading is based on deposition testimony of former employees McClintock and Yang, but neither McClintock nor Yang worked with Nintendo shipments during the relevant period. During the February 17, 2012, oral argument, counsel for Mitsui was asked:

> JUDGE GUTHRIDGE: . . . When Nintendo was shipping a particular container, did Nintendo know where that container was going?
>
> MR. FINK: Nintendo, to the best of my knowledge, and *I'll give you the best of my knowledge from what we've been able to decipher*, is Nintendo – first of all, there wasn't one door point, there were a couple of door points, but there were –
>
> JUDGE GUTHRIDGE: Whether there was one or two, but was it going to – did Nintendo know when it shipped a container it was going to a place different than was listed in the Mitsui Bill of Lading?
>
> MR. FINK: *To the best of our knowledge from what we've been able to find out*, Nintendo consigned all of its cargo to one warehouse and booked it to one warehouse in Washington.
>
> JUDGE GUTHRIDGE: Washington State.

> MR. FINK: Washington State, Your Honor. That's correct. From time to time there were instances wherein that warehouse became at capacity. And then while cargo was moving, they determined that it would go to someplace else.
>
> I'm not sure that they knew exactly when they knew that they would move it to someplace else, but they did want to move it to a neighboring warehouse. And a lot of these locations were very close to each other, these warehouses. And that's – and the cargo was then consigned to, or it ended up in another location. But this is not a situation wherein it's anywhere close to what was going on with what the Global Link practice and transactions were.

February 17, 2012, Transcript of Oral Argument at 52-54 (emphasis added). Counsel also stated:

> MR. FINK: Nintendo would change the routing. And there is an issue that they're raising as to what extent did Mitsui have knowledge, and to what extent did Mitsui participate in that. Our understanding is that Mitsui personnel did not participate in that. Mr. McClintock has testimony that he thought that there was some participation. We've checked with other people, and our understanding from those individuals is they did not have participation in it. But Nintendo would be the one to make the determination of where their cargo was to be – which warehouse in Washington their cargo would go to.

Id. at 63-64. Therefore, the record does not reflect whether Mitsui and Nintendo had a "standard operating procedure" as Respondents contend.

The potential relevance of the Mitsui/Nintendo practice to a reparation award warrants additional inquiry, although not to the extent sought by Respondents.

Olympus Respondents' discovery, particularly Interrogatories 17 through 20, seeks information about diversion of cargo carried by Mitsui over the last ten years for any shipper, including Nintendo. (Joint Motion to Compel at 6-7.) Mitsui is ordered to respond to Olympus Respondents' discovery by describing in detail its practice with Nintendo pursuant to which Nintendo shipments were diverted from the destination stated on the Mitsui bill of lading to another destination during the period at issue in this proceeding; that is, "[f]rom 2004 through . . . 2006," (Amended Complaint ¶ 4.E), and state whether it had a policy or practice of waiving diversion charges or not rerating shipments to new destinations for any of its large shippers. This description must include:

1. A full and complete explanation of the process that resulted in a shipment being delivered to a destination other than that listed on the Mitsui bill of lading;

2. Whether the service contract required the payment of a diversion charge;

3. Whether Nintendo paid the diversion charge;

4. Whether the service contract rate to the new destination differed from the rate to the destination listed on the Mitsui bill of lading;

5. Whether Nintendo paid the destination charge to the new destination;

6. Whether Mitsui has or had a policy or practice of waiving diversion charges or not rerating shipments to new destinations for any of its large shippers. If so, describe the policy in detail.

Mitsui is also ordered to produce copies of all shipping documents for ten representative diverted Nintendo shipments during this period. If Respondents believe that the shipping documents for those ten shipments do not sufficiently demonstrate the Mitsui/Nintendo relationship, they should confer with Mitsui about a more representative sample. If the parties are unable to resolve this question on their own, I would entertain a renewed motion to compel a more representative sample.

II. SECOND DEPOSITION OF NONPARTY WITNESS PAUL McCLINTOCK.

Mitsui filed a motion to conduct a second deposition of former Mitsui employee Paul McClintock based on emails that were not produced by Mitsui until after his September 21, 2011, deposition. Respondents opposed the motion. During the hearing, Mitsui stated that it was now "neutral" on whether to conduct a second deposition. February 17, 2012, Transcript of Oral Argument at 79-80.

Since Respondents oppose a second deposition and Mitsui, the moving party, is now "neutral" on a second deposition, Mitsui's Motion for Leave to Subpoena and Re-Depose Non-Party Witness Paul McClintock Pursuant to Commission Rules 131 and 201 is denied.

ORDER

Upon consideration of the request of respondent Global Link Logistics, Inc., to issue a subpoena *duces tecum* requiring nonparty Nintendo of America, Inc., to produce records of its shipments with complainant Mitsui O.S.K. Lines Ltd., the written and oral arguments of the parties, and the record herein, and for the reasons stated above, it is hereby

ORDERED that Global Link's request be **DENIED**.

Upon consideration of the Joint Motion to Compel Compliance with Outstanding Discovery and for Sanctions filed on October 11, 2011, by respondents Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, David Cardenas, and Keith Heffernan, the written and oral arguments of the parties, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the Joint Motion to Compel be **GRANTED IN PART** and **DENIED IN PART**. As set forth in Part I.C.2 above, Complainant Mitsui is ordered to describe in detail its practice with Nintendo pursuant to which Nintendo shipments were delivered to a destination other than that stated on the Mitsui bill of lading and produce the supporting documents. Mitsui must produce its response on or before May 4, 2012. In other respects, the Joint Motion to Compel is denied.

Upon consideration of Complainant's Motion for Leave to Subpoena and Re-Depose Non-Party Witness Paul McClintock Pursuant to Commission Rules 131 and 201 (filed November 23, 2011), the written and oral arguments of the parties, the record herein, and for the reasons stated above, it is hereby

ORDERED that the motion be **DENIED**.

Clay G. Guthridge
Administrative Law Judge